SUPREME COURT
01-399 AUG 21 2001
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,
PETITIONER,

-vs-

DeANDRE LAVAR LUCAS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is there a *Batson*[1] violation when the State exercises a peremptory challenge for a nondiscriminatory purpose and a discriminatory purpose?

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1. *Batson v. Kentucky*, 476 U.S. 79 (1986).

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OPINION BELOW

The State of Arizona seeks review of the Arizona Court of Appeals' opinion filed on February 13, 2001, which reversed Respondent's convictions for attempted sexual assault, sexual abuse of a child under the age of fifteen, and kidnapping on the basis that there was reversible error under *Batson v. Kentucky*, 476 U.S. 79 (1986), based on the prosecutor's articulating both a nondiscriminatory and a discriminatory reason for striking a venireman. That opinion is reported at 18 P.3d 160 (Ariz. App. 2001). A copy of that opinion is attached hereto as Appendix A.

STATEMENT OF JURISDICTION

Petitioner requests a Writ of Certiorari issue to review the opinion of the Arizona Court of Appeals. (Appendix A.) On May 23, 2001, the Arizona Supreme Court denied the State of Arizona's petition for review. (Appendix B.) Petitioners timely filed the petition for writ of certiorari within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254; and Supreme Court Rule 10.1.

PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The State charged Respondent with attempted sexual assault, sexual abuse, and kidnapping, all dangerous crimes against children under Arizona law.

During jury selection, a venireman, Mr. Tibbs, told the trial court that he had a law degree and was working on a Ph.D. in justice studies at Arizona State University. When the prosecutor, who was pregnant, struck Mr. Tibbs, Respondent objected to his removal under *Batson*. When the trial court asked for the prosecutor's response, she stated:

> Your Honor, Mr. Tibbs is a lawyer. I have a personal problem. I do not—I have never allowed a lawyer to sit on a jury since I had my first "not guilty" verdict.
>
> He's also from the south, Your Honor, which is an area where I was born and raised. And I have problem with males from the south having prejudice against women working, especially in my current condition.

The trial court permitted the strike, noting that "it's very seldom that attorneys like to leave an attorney or judge on a jury panel. And I find that the State's strike was made for a nondiscriminatory purpose, so I will allow it."

On February 13, 2001, the Arizona Court of Appeals reversed Respondent's conviction. The court reasoned that the second basis given for the strike, that southern men take a negative view of pregnant women who work, was "an unacceptable anecdotal generalization without basis in fact." Appendix A, ¶ 10. The court relied on cases from the South Carolina Supreme Court and the Military Court of Appeals to support its position. *Id.* The court reasoned that if one cannot discriminate against males, it follows that one cannot discriminate against a geographical subgroup of males. *Id.* The court found that counsel's second stated reason for striking the only African-

American panel member, that he was a southern male, tainted the entire jury proceedings, requiring reversal. *Id.* at ¶ 11.

On May 23, 2001, the Arizona Supreme Court denied review. Appendix B.

REASON THE WRIT SHOULD ISSUE

THIS COURT SHOULD RESOLVE A SUBSTANTIAL CONFLICT BETWEEN THE STATES AND THE FEDERAL CIRCUIT COURTS OF APPEAL AND RECOGNIZE THE DUAL MOTIVATION ANALYSIS IN JURY SELECTION, WHICH PROVIDES THAT THERE IS NO *BATSON* VIOLATION WHEN A PARTY EXERCISES A PEREMPTORY CHALLENGE FOR A NONDISCRIMINATORY PURPOSE AND A DISCRIMINATORY PURPOSE IF THE STATE SHOWS THAT IT WOULD HAVE EXERCISED THE STRIKE EVEN WITHOUT THE DISCRIMINATORY MOTIVE.

Petitioner respectfully requests this Court to grant the petition for writ of certiorari and resolve whether the dual motivation concept is applicable in the *Batson* context. There is a conflict between federal circuit courts of appeal and states that are in those circuits, and a conflict between states that recognize the dual motivation analysis, and those that do not.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court recognized that a claim of purposeful racial discrimination by the prosecution in selecting a jury raises serious constitutional questions, not only for the integrity of a particular trial, but also for the perceived fairness of the judicial system as a whole. 476 U.S. at 87-88. The Court concluded that "[a]lthough a prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried . . . the Equal Protection Clause forbids the prosecutor to challenge potential jurors *solely* on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." 476 U.S. at 89 (emphasis added).

This Court later held that: (1) gender-based challenges also are impermissible, *J.E.B. v. Alabama*, 511 U.S. 127, 146 (1994); (2) that the defendant has standing to challenge a peremptory strike of a particular juror, even if the defendant is not of the same race, *Powers v. Ohio*, 499 U.S. 400, 406–10 (1991); and, (3) that the equal protection right at stake is that of the juror, *not* the defendant, *Id.* at 409–16.

Several circuits have declined to find a *Batson* violation when a party exercises a peremptory challenge for both a nondiscriminatory purpose and a discriminatory purpose. Under the "dual motivation" analysis, once the opponent of a strike has established a prima facie case of discrimination, the proponent of the strike has the opportunity to show that he would have exercised the strike, even without the discriminatory motive. *United States v. Tokars*, 95 F.3d 1520, 1533 n.4 (11th Cir. 1996). The circuits have adopted this analysis from this Court's holdings in Equal Protection cases, and from federal labor and regulatory statutes.

I. THERE IS SUBSTANTIAL CONFLICT IN THE APPLICATION OF DUAL MOTIVATION ANALYSIS IN THE *BATSON* CONTEXT.

If a party exercises a peremptory challenge for both a nondiscriminatory purpose and a discriminatory purpose, the Second, Fourth, Eighth, and Eleventh circuits have held that the trial court's recognition of the nondiscriminatory reason provides appropriate findings for an appellate court to apply a dual motivation analysis. This dual motivation analysis grants the proponent of a strike the opportunity to raise an affirmative defense after the opponent of the strike has established a prima facie case of discrimination. *See Wallace v. Morrison*, 87 F.3d 1271, 1274–75 (11th Cir. 1996) (applying dual motivation where prosecutor stated that race was a factor considered in the exercise of peremptory strike); *Tokars*, 95 F.3d at 1533–34 (same).

Under the dual motivation analysis, the trial court must decide "whether the party whose conduct is being challenged has demonstrated, by a preponderance of the evidence, that the strike would have nevertheless been exercised even if an improper factor had not motivated in part the decision to strike." *Jones v. Plaster*, 57 F.3d 417, 421 (4th Cir. 1995). If so, the peremptory challenge is not subject to constitutional attack. 57 F.3d at 421.

The Second, Fourth, Eighth, and Eleventh circuit courts of appeal have applied dual motivation analysis in the *Batson* context. *See United States v. Darden*, 70 F.3d 1507, 1530-32 (8th Cir. 1995) (applying dual motivation where prosecutor struck on basis of youth, inexperience, and belief in a young black female tendency "to testify on behalf and be more sympathetic toward individuals who are involved in narcotics"; *Howard v. Senkowski*, 986 F.2d 24, 30 (2d Cir. 1993) ("*Watson* challenges may be brought by defendants who can show that racial discrimination was a substantial part of the motivation for a prosecutor's peremptory challenges, leaving to the prosecutor the affirmative defense of showing that the same challenges would have been exercised for race-neutral reasons in the absence of such partially improper motivation.") To prove this affirmative defense, the proponent of the strike bears the burden of proving by a preponderance of the evidence that the strike would have been exercised even in the absence of the discriminatory motivation. *Wallace*, 87 F.3d at 1275.

Several states within federal circuits that apply dual motivation analysis do not, however, recognize the concept. South Carolina, which is in the Fourth Circuit, does not recognize dual motivation. *See State v. Haigler,* 515 S.E.2d 82, 92 (S.C. 1998) (applying the "tainted" approach). Nor does Alabama, which is in the Eleventh Circuit. *See McCray v. State,* 738 So. 2d 911, 914 (Ala. Crim. App. 1998) (applying the "tainted approach," stating that "a race-neutral reason for a peremptory strike will not 'cancel out' a race-based reason"). Nor does Georgia, which is also in the Eleventh Circuit. *Rector v. State*, 444 S.E.2d 862, 865 (Ga. App. 1994) (race neutral

explanations did not cure "element of the stereotypical reasoning" in State's exercise of peremptory strike).

Besides conflicts between states and the circuits that they are in, there is conflict between the states regarding the application of dual motivation analysis to jury selection. Wisconsin has rejected the dual motivation concept. *State v. King*, 572 N.W.2d 530 (Wis. App. 1997) ("there the challenged party admits reliance on a prohibited discriminatory characteristic, we do not see how a response that other factors were also used is sufficient rebuttal under the second prong of Batson.") Texas does not recognize the concept in the *Batson* context. *Moore v. State*, 811 S.W.2d 197, 200 (Tex. Ct. App. 1991) ("Even though the prosecutor may have given one racially neutral explanation, the racially motivated explanation 'vitiates the legitimacy of the entire [jury selection] procedure.'")

Illinois, Connecticut, and Delaware, on the other hand, do recognize the dual motivation approach. *People v. Hudson*, 745 N.E.2d 1246, 1258 (Ill. 2001) (remanding for rehearing with directions that if the facts demonstrate that State would have struck female venire even in the absence of gender-related reason, then there was no prejudice); *State v. Hodge*, 726 A.2d 531, 544 (Conn. 1999) (recognizing dual motivation analysis); *Gattis v. State*, 697 A.2d 1174, 1184 (Del. 1997) (endorsing use of dual motivation analysis).

In its opinion in *Tokars*, the Eleventh Circuit stated that "resort to dual motivation analysis will rarely be necessary. By now, no competent prosecutor or defense attorney is unaware of the fact that strikes on the basis of race or gender are prohibited." 95 F.3d at 1534. The dual motivation analysis is regularly used in some circuits and states, but there is little uniformity in its application nationwide.

II. THE APPLICATION OF DUAL MOTIVATION ANALYSIS IN OTHER CONTEXTS.

Dual motivation was first considered by this Court in *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). There, an untenured teacher, having been discharged from his employment, brought an action against his former employer for reinstatement and damages, claiming that the school district's refusal to rehire him violated his rights under the First and Fourteenth Amendments. This Court held that, when a public employee shows that protected speech was a "motivating factor" in an adverse employment decision, the employer still prevails by showing that it would have reached the same decision in the absence of the protected conduct. 429 U.S. at 287.

This Court has also recognized a dual motivation analysis in other areas of Equal Protection analysis, principally civil rights and desegregation cases. *See, e.g., Hunter v. Underwood*, 471 U.S. 222, 227-28 (1985) (official action not unconstitutional solely because it results in a racially disproportionate impact; proof of racially discriminatory intent or purpose required to show a violation of the Equal Protection Clause, in disenfranchising persons convicted of crimes involving moral turpitude); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270, n. 21, (1977) (proof that local authorities' refusal to change the tract from a single-family to a multi-family classification was racially discriminatory was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision); *Palmer v. Thompson*, 403 U.S. 217, 225 (1971) (proof of an impermissible motive for provision would not warrant its invalidation in face of the permissible motive in case involving city's closing public swimming pools rather than attempting to operate them on a desegregated basis).

The dual motivation concept has been incorporated into labor and regulatory statutes in other areas of the law. In determining whether an employer has committed an unfair labor practice under 29 U.S.C.

§158(a)(3), "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization," the National Labor Relations Board employs the test first articulated in *Wright Line*, 251 N.L.R.B. 1083, *enforced*, 662 F.2d 899 (1st Cir.1981). Under the *Wright Line* test, the General Counsel must first make a prima facie showing sufficient to support an inference that the employee's protected conduct was a "motivating factor" in the employer's decision. The burden then shifts to the employer to demonstrate that it would have taken the same action even if the employee had not engaged in the protected activity. *Wright Line*, 251 N.L.R.B. at 1089.

Similarly, under the "whistle blower" provisions of the Energy Reorganization Act (ERA), an employee must establish that an employer retaliated because the employee engaged in protected activity. 42 U.S.C. § 5851(a)(1)(E), (F). *Bartlik v. United States Dep't of Labor*, 73 F.3d 100, 103 & n. 6 (6th Cir. 1996). If an employer discharges the employee for both legitimate and illegitimate reasons, courts apply the "dual motive" test, under which the employer must show that it would have discharged the employee even if the protected activity had not occurred. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163-64 (9th Cir. 1984). The employer bears the risk if the two motives prove inseparable. 735 F.2d at 1164.

Under the Safety Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105, once a complainant has made out a prima facie case of retaliatory discharge, the employer may rebut that showing with evidence of a legitimate, nonretaliatory reason for the discharge. The burden then shifts back to the complainant to prove that the proffered reason is a pretext for unlawful retaliation. *See Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987) (adapting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to a STAA claim). Where evidence of a dual motive exists, *i.e.*, where there are legitimate reasons for a discharge besides the illegitimate reasons, the employer bears the burden of establishing,

by a preponderance of the evidence, that it would have taken the adverse employment action in the absence of the employee's protected activity. *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989).

III. THE ARIZONA COURT OF APPEALS' REFUSAL TO APPLY THE DUAL MOTIVATION ANALYSIS IN THE *BATSON* CONTEXT IS BASED ON THE VIEW HELD BY ONLY A FEW STATES AND BY NONE OF THE FEDERAL CIRCUITS.

The Second Circuit has rejected substantially the same arguments the Arizona Court of Appeals advanced in rejecting the dual motivation analysis, in the context of race. *Howard*, 986 F.2d at 26–28. As the Second Circuit explained, "the acknowledgment that race was part of the prosecutor's motivation, or even a finding to that effect unaided by acknowledgment, is not inconsistent with the existence of some other race-neutral explanation for the prosecutor's action. A person may act for more than one reason." 986 F.2d at 26. Moreover, even strikes based on characteristics that are disproportionately associated with one gender could be appropriate, absent a showing of a pretext. *J.E.B. v. Alabama*, 511 U.S. 127, 143 (1994).

Here, the prosecutor's nondiscriminatory reason for striking Mr. Tibbs, that he was an attorney, was a sufficient race- and gender-neutral basis for the trial court to sustain that strike. Whether the prosecutor's second reason, that Mr. Tibbs was a southern male, might have been discriminatory, is overcome by the nondiscriminatory reason under a dual motivation analysis. The prosecutor told the trial court that she did not want Mr. Tibbs on the jury because he was a lawyer, and the trial court found this was a proper basis.

A prospective juror's employment is a race-neutral reason for removing him from the panel. *United States v. Lane*, 866 F.2d 103, 106 (4th Cir.1989) ("current and past employment" are legitimate race-neutral grounds for peremptory strikes).[2] In *Evans v. United States*,

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2. This is also recognized under Arizona law. See *State v.*
(continued...)

682 A.2d 644 (D.C. App. 1996), the prosecutor struck an older black man because he was a lawyer. 682 A.2d at 646. The court found that the prosecutor's reasons were "legitimate," and rejected the *Batson* challenge. *Id.*

Whether the prosecutor's remarks that southern men, such as Mr. Tibbs, take a negative view of pregnant women who work, was "an unacceptable anecdotal generalization without basis in fact," there was no *Batson* violation under dual motivation analysis. Mr. Tibbs' occupation as an attorney was a sufficient, nondiscriminatory basis for excluding him from the jury. The trial court properly found that prosecutor made the strike for a nondiscriminatory purpose, and allowed it.

The Arizona Court of Appeals rejected the dual motivation approach and adopted the tainted approach based on its belief that *Batson* "protects against only the most conspicuous and egregious biases." Appendix A, at ¶ 12. The court stated that to excuse such "obvious prejudice" if the proponent can also articulate nondiscriminatory reasons for the strike "would erode what little protection *Batson* provides against discrimination in jury selection." *Id.*, citing *Payton,* 495 S.E.2d at 210.

The Arizona Court of Appeals' finding that a discriminatory basis for a strike will always taint a nondiscriminatory basis for a strike is factually and legally incorrect. Under the dual motivation analysis, the burden is still on the proponent of the strike to show that the strike would have been exercised, even without the discriminatory

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2. (...continued)
Sanderson, 898 P.2d 483, 489 (Ariz. App. 1995) ("Prospective jurors' age, marital status and lack of employment have been identified as nondiscriminatory reasons supporting the exercise of peremptory strikes."); *State v. Hernandez*, 823 P.2d 1309, 1313 (Ariz. App. 1991) ("It is appropriate to consider a prospective juror's work history in exercising peremptory challenges.")

motive, once the opponent of a strike has established a prima facie case of discrimination. No person will be denied the equal protection of the law if the dual motivation approach becomes part of *Batson* jurisprudence.

CONCLUSION

The principle of equality will not be diminished, nor will the integrity of our judicial system be jeopardized, if dual motivation analysis is applied to jury selection. The proponent of the strike must still show that the strike would have been exercised, even without the discriminatory motive, once the opponent of a strike has established a prima facie case of discrimination. Petitioner respectfully requests this Court to grant the petition for writ of certiorari and reverse the opinion of the Arizona Court of Appeals.

Respectfully submitted,

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APPENDIX A

[Filed February 13, 2001]

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	
	)	1 CA-CR 99-0567
Appellee,	)	
	)	DEPARTMENT B
v.	)	
	)	O P I N I O N
DeANDRE LAVAR LUCAS,	)	Filed 2-13-01
Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 99-90354
The Honorable Barbara M. Jarrett, Judge

REVERSED

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GARBARINO, Judge

¶1 The defendant, DeAndre Lavar Lucas, appeals his convictions for attempted sexual assault, sexual abuse of a child under the age of fifteen, and kidnapping. The defendant contends that the trial court erred when, despite defense counsel's *Batson*[3] objection, it permitted the prosecutor to peremptorily strike the only African American panel member based on the pretext that he was a "southern male." We agree and reverse.

¶2 On a December evening in 1998, the defendant, who was eighteen years old at the time, attacked the victim, a fourteen-year-old female, and stole her purse and its contents. The victim testified that the defendant had forced her to the ground, attempted to take her purse, touched her breasts, tried to unzip her pants, and choked her until she fainted. She also testified that when she regained consciousness, both the defendant and her purse were gone. Although the defendant admitted that he had attacked the victim, he testified that he was only after the victim's money and he had made no attempt to kidnap or rape her.

¶3 A grand jury indicted the defendant on one count of attempted sexual assault, a class 3 felony and dangerous crime against children, one count of sexual abuse, a class 3 felony and dangerous crime against children, and one count of kidnapping, a class 2 felony and dangerous crime against children. The case proceeded to trial and the jury convicted the defendant as charged.

¶4 The trial court suspended the defendant's sentence and imposed lifetime probation for the attempted sexual assault and sexual abuse convictions. For the kidnapping conviction, the trial court sentenced the defendant to the presumptive term of seventeen years in prison,

3. *Batson v. Kentucky*, 476 U.S. 79 (1986).

with credit for 178 days of pre-sentence incarceration. The defendant filed a timely notice of appeal.

¶5 The defendant argues that the State violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution when it peremptorily struck the only African American male juror on the jury panel, in part because he was a southern male. The defendant also urges us to explore his claim that the State's actions violate the Arizona Constitution. We note that, absent a showing of fundamental error, defense counsel waived any state constitutional violation by failing to raise it at trial. *See State v. Eagle,* 196 Ariz. 27, 30, ¶ 13, 992 P.2d 1122, 1125 (App. 1998), *aff'd*, 196 Ariz. 188, 994 P.2d 395, *cert. denied,* 121 S. Ct. 102 (2000). However, with respect to *Batson* challenges, even if we were to conclude that the defendant did not waive what he believes to be a state constitutional violation, the protections under our state constitution are no greater than those provided for under the federal constitution. *Id.* at 31, ¶ 14, 992 P.2d at 1126.

¶6 Turning, then, to the remaining issue, when considering a *Batson* challenge, we will defer to the trial court's findings of fact unless clearly erroneous. *State v. Harris*, 184 Ariz. 617, 618, 911 P.2d 623, 624 (App. 1995). We review de novo the trial court's application of the law. *Ramirez v. Health Partners of S. Ariz.*, 193 Ariz. 325, 327-28, ¶ 6, 972 P.2d 658, 660-61 (App. 1998) ("Issues involving . . . constitutional claims are questions of law subject to this court's *de novo* review.").

¶7 In *Purkett v. Elem*, 514 U.S. 765 (1995) (per curiam), the United States Supreme Court refined the test for determining whether a juror has been struck for a reason violative of *Batson*. First, the opponent of the strike must make a *prima facie* showing of discrimination on the basis of race, gender, or some other protected characteristic. *Id.* at 767; *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 144-45 (1994). Next, the proponent of the strike must offer a neutral basis for the strike. *Purkett*, 514 U.S. at 767. The basis must be more than a mere

denial of improper motive, but it need not be "persuasive, or even plausible." *Id.* at 768. After a neutral basis has been offered, the opponent of the strike must persuade the trial court that the proponent's reason is pretextual and that the strike is actually based on race, gender, or another protected characteristic. *Id.*

¶8 Defense counsel objected to the panel member's removal on the grounds that he "is the only black male on the entire panel," "[h]e's educated in the law [and] . . . understands the standards," and "he's from the south, he understands and knows the stereotypes in which my client's going to be dealing with." The prosecutor stated that she wished to remove the venire person because he is a lawyer, and she never allows lawyers on her juries. She also stated that she did not want to have the venire person on the jury because "h]e's from the south . . . . I have a problem with males from the south having prejudice against women working," particularly when they are pregnant, as the prosecutor apparently was at the time of trial. The trial court overruled the defendant's objection to the State's strike and concluded that the State's basis that the panel member was an attorney was proper. The court went on to state, "it's very seldom that attorneys like to leave an attorney or a judge on a jury panel. And I find that the State's strike was made for a nondiscriminatory purpose, so I will allow it." The court did not address the prosecutor's additional reason for striking the panel member.

¶9 The prosecutor offered two grounds for her strike. The first reason given for the strike--that the venire person was an attorney--was a permissible race and gender neutral reason. A neutral explanation for a peremptory strike need not be coupled with some form of objective verification. *Eagle*, 196 Ariz. at 30, ¶ 11, 992 P.2d at 1125; *State v. Henry*, 191 Ariz. 283, 286, 955 P.2d 39, 42 (App. 1997); *see State v. Trostle*, 191 Ariz. 4, 12, 951 P.2d 869, 877 (1997) (refusing to examine "the continued validity of *[State v. Cruz,* 175 Ariz. 395, 857 P.2d 1249 (1993), and its requirement that explanations be objectively verifiable] in light of . . . *Purkett*").

¶10 By contrast, the second basis given for the strike--that southern men take a negative view of pregnant women who work--is an unacceptable anecdotal generalization without basis in fact. *Cf. Payton v. Kearse,* 495 S.E.2d 205, 208 (S.C. 1998) (finding counsel's reason for striking a panel member--that she was a "redneck"-was "not a valid race-neutral reason to strike a potential juror"; *United States. v. Greene,* 36 M.J. 274, 278-79 (C.M.A. 1993) (holding that counsel's strike of a panel member due to an assumed "Latin macho type of attitude" toward sex offenses "constituted a gross racial stereotype or anecdotal generalization which was clearly condemned in the *Batson* and *Hernandez* decisions"). To suggest that all southern males believe that pregnant females should not work wrongfully excludes a subgroup of one gender from participation in the judicial process and "reinforce[s] prejudicial views of the relative abilities of men and women." *J.E.B.,* 511 U.S. at 140. We emphasize that counsel did not say "southerners" are often prejudiced "against women working." Rather, counsel argued that southern *males* often feel this way. "Striking individual jurors on the assumption that they hold particular views simply because of their gender is 'practically a brand upon them, affixed by law, an assertion of their inferiority.'" *Id.* at 142 (quoting *Strauder v. West Virginia,* 100 U.S. 303, 308 (1880)). If one cannot discriminate against males, it follows that one cannot discriminate against a geographical subgroup of males. *See generally State v. Sanderson,* 182 Ariz. 534, 540, 898 P.2d 483, 489 (App. 1995) (considering an appeal in which the defendant presented a *prima facie* showing of discrimination on the combined bases of race and gender). *But see Turner v. Marshall,* 63 F.3d 807, 812 (9th Cir. 1995) (limiting its examination to whether the defendant had made "a prima facie case of impermissible exclusion of African-American jurors as a class, with no reference to gender," because "neither the Supreme Court nor the Ninth Circuit has recognized that the combination of race and gender, such as 'black males,' may establish a cognizable group for *Batson* purposes"), overruled on other grounds by *Tolbert v. Page,* 182 F.3d 677 (9th Cir. 1999) (en banc).

¶11 We find that counsel's non-neutral reason for striking the only African American panel member-- that he was a southern male-- tainted the entire jury proceedings, requiring reversal in this case. "Once a discriminatory reason has been uncovered-- either inherent or pretextual--this reason taints" any other neutral reason for the strike. *Payton,* 495 S.E.2d at 210. Regardless of how many other nondiscriminatory factors are considered, any consideration of a discriminatory factor directly conflicts with the purpose of *Batson* and taints the entire jury selection process. *Id.*; *State v. Haigler,* 515 S.E.2d 88, 92 (S.C. 1999) (applying the tainted approach while emphasizing that the non-neutral reason must be "fundamentally implausible or pretextual"); *McCray v. State,* 738 So. 2d 911, 914 (Ala. Crim. App. 1998) (applying the tainted approach and stating that "a race-neutral reason for a peremptory strike will not 'cancel out' a race-based reason"), *cert. denied* (1999); *Rector v. State,* 444 S.E.2d 862, 865 (Ga. Ct. App. 1994) (accepting the tainted approach); *Moore v. State,* 811 S.W.2d 197, 200 (Tex. Ct. App. 1991) ("Even though the prosecutor may have given one racially neutral explanation, the racially motivated explanation 'vitiates the legitimacy of the entire [jury selection] procedure.'"quoting *Speaker v. State,* 740 S.W.2d 486, 489 (Tex. Ct. App. 1987))) (alteration in original).

¶12 In contrast to our decision here, some courts have applied a "dual motivation" analysis to similar factual situations. Under the dual motivation approach, once the opponent of a strike has established a *prima facie* case of discrimination, the proponent of the strike has the opportunity to show that the strike would have been exercised even without the discriminatory motive. *See United States v. Tokars,* 95 F.3d 1520, 1533 (11th Cir. 1996) (applying the dual motivation analysis to a *Batson* challenge and citing cases from the Second, Fourth, and Eighth Circuits that have done the same), *cert. denied,* 520 U.S. 1151 (1997); *cf. State v. Hodge,* 726 A.2d 531, 544 (Conn.) (recognizing the dual motivation doctrine but refusing to apply this doctrine when counsel failed to raise a dual motivation claim at trial), *cert. denied,* 528 U.S. 969 (1999). We reject the dual motivation

approach and adopt the tainted approach because we recognize that *Batson* protects against only the most conspicuous and egregious biases. "To excuse such obvious prejudice because the challenged party can also articulate nondiscriminatory reasons for the peremptory strike would erode what little protection *Batson* provides against discrimination in jury selection." *Payton,* 495 S.E.2d at 210.

¶13 For the foregoing reasons, we find that the State's impermissible gender- and/or race-motivated strike tainted any nondiscriminatory reasons it may have had. Accordingly, we reverse the defendant's convictions.

WILLIAM F. GARBARINO, Judge
CONCURRING:
NOEL FIDEL, Presiding Judge
RUDOLPH J. GERBER, Judge

APPENDIX B

[Filed June 4, 2001]

SUPREME COURT OF ARIZONA

NOEL K. DESSAINT
CLERK OF THE COURT

STATE OF ARIZONA
402 ARIZONA STATE COURTS BUILDING
PHOENIX, ARIZONA 85007-3231

KATHLEEN K. KEMPLEY
CHIEF DEPUTY CLERK

TELEPHONE (602(542-9396

May 30, 2001

RE: **STATE OF ARIZONA vs. DeAndre Lavar Lucas**
Arizona Supreme Court No. CR-01-0096-PR
Court of Appeals Division One No. 1 CA-CR 99-0567
Maricopa County Superior Court No. CR 99-90354

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 23, 2001, in regard to the above-referenced cause:

ORDERED: The State of Arizona's Petition for Review = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 30th day of May, 2001.

Noel K. Dessaint, Clerk

TO:
Hon. Janet A. Napolitano, Esq., Arizona Attorney Generai
Attn: Randall M. Howe, Esq., and Consuelo M. Ohanesian, Esq.
James J Haas, Maricopa County Public Defender
Attn: Garrett W. Simpson, Esq.
DeAndre Lavar Lucas, ADOC #145204, Arizona State Prison, Florence
Glen D Clark, Clerk, Court of Appeals, Division One
West Publishing Company, Editorial Department D4-40
Lexis-Nexis
dk

APPENDIX C

[Filed June 22, 2001]

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA CR 99-0567
	)	DEPARTMENT B
Appellee,	)	
	)	MARICOPA County
vs.	)	Superior Court
	)	No. CR 99-90354
DeANDRE LAVAR LUCAS	)	
	)	
Appellant.	)	
	)	

ORDER and MANDATE

Janet A. Napolitano, The Attorney General
By: Randall M. Howe, Chief Counsel
Criminal Appeals Section
and
Consuelo M. Ohanesian, Assistant Attorney General
Attorneys for Appellee Phoenix

Attorney for Appellant Phoenix

The opinion of this Court in the above matter was filed on February 13, 2001.

A petition for review was filed. The record was forwarded to the Arizona Supreme Court. By order, dated May 30, 2001, the Arizona

Supreme Court denied the petition for review, Supreme Court No. CR-01-0096-PR.

IT IS ORDERED in conformity with the opinion attached hereto.

IT IS FURTHER ORDERED that a certified copy of the foregoing ORDER and MANDATE and a copy of the opinion of the Court were mailed to the Clerk of the Superior Court for MARICOPA County, Arizona, on June 22, 2001. A copy of the ORDER and MANDATE and a copy of the opinion were mailed to the Honorable Barbara M. Jarrett, Judge, and a copy of the ORDER and MANDATE was mailed on said day to each party appearing or the attorneys of record; as well as the MARICOPA County Attorney.

IT IS FURTHER ORDERED pursuant to this Court's order of the 11th day of March, 1965, that the Clerk of this Court return to the Clerk of Superior Court, all records, exhibits, and other matters received from said Clerk of this Court in aid of the consideration of this matter.

DATED June 22, 2001.

/s/Edward C. Voss
Vice Chief Judge

All of the foregoing directives were completed with June 22, 2001.

GLEN D. CLARK, Clerk
By

/s/_____
Deputy Clerk